IN THE HIGH COURT OF KERALA AT ERNAKULAM

PRESENT :

THE HONOURABLE MR. JUSTICE R.BASANT

WEDNESDAY, THE 11TH OCTOBER 2006 / 19TH ASWINA 1928

Crl.Rev.Pet.No. 2963 of 2006()

CRMP.6584/2006 of JUDL.MAGISTRATE OF FIRST CLASS COURT, OTTAPPALAM

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REVN. PETITIONER: PETITIONER:

ZEENATH K.V., D/O. UMMER,
AGED 23 YEARS, KUNNATH HOUSE, EAST OTTAPPALAM,
OTTAPPALAM AMSOM, ARIYUR THEKKUMURI DESOM,
OTTAPPALAM TALUK.

BY ADV. SRI.M.V.BOSE
SRI.VINOD MADHAVAN
SMT.NISHA BOSE

RESPONDENTS: COUNTER PETITIONER & STATE:
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1. KADEEJA, W/O.LATE MOOSA,
AGED 60 YEARS, KALLIVALAPPIL HOUSE, PILATHARA,
CHUNANGAD AMSOM, PILATHARA DESOM, CHUNANGAD P.O.,
OTTAPPALAM TALUK.

2. STATE OF KERALA,
REP. BY PUBLIC PROSECUTOR, HIGH COURT OF KERALA,
ERNAKULAM.

BY P.P. SRI.C.K. SURESH.
BY ADV. SRI.THOMAS M.JACOB
SRI.G.RAJAGOPAL

THIS CRIMINAL REVISION PETITION HAVING BEEN FINALLY HEARD ON 11/10/2006, THE COURT ON THE SAME DAY PASSED THE FOLLOWING:

R. BASANT, J.

CRL.R.P.NO. 2963 OF 2006

Dated this the 11th day of October, 2006

ORDER

Under what circumstances can the power under Sec.97 and/or Sec.98 of the Cr.P.C. be invoked by a Magistrate in a dispute regarding custody of minor children? This is the crucial question that arises for consideration in this revision petition directed against an order under which the petitioner's application praying for action under Sec.97 or 98 of the Cr.P.C. was dismissed by the court below. The young counsel Mr.Thomas M. Jacob and Mr.Vinod Madhavan have researched the question in detail to assist this Court.

2. To the skeletal facts first. The petitioner is a 23 years old mother of two minor female children aged 4 years and 1 ½ years respectively. Her husband was employed abroad. She was residing in her matrimonial home along with the relatives of her husband including the respondent herein – her mother-in-law. She would allege that there was ill-treatment at the matrimonial home and she hence decided to leave the matrimonial home and take up employment at

Nasik in Maharashtra. With the help of a friend of her husband one Ismail, she allegedly left her native place leaving the 4 year old elder child at her matrimonial home and the 1 ½ year old younger child at her parental home along with her parents.

3. The petitioner, who had requested her father to bring her from her matrimonial home, had reached her house. But thereafter she made herself scarce on 21/3/2006. She left the native place without leaving any word to any one admittedly along with the said Ismail.

4. The worried father of the petitioner made frantic enquiries to trace her. She was not available any where. This obliged him to lodge a complaint before the police and the police registered a crime under the caption “woman missing”. Even in the First Information Statement it is stated clearly that the 4 year old child was with the respondent herein and that the 1 ½ year old child was left at her parental home. That child was taken back to the matrimonial home by the relatives of the husband who had come to the house of the petitioner on coming to know of the fact that she was missing. The respondent herein is the grandmother. She has another daughter-in-law by name

'Sulekha'. The husband of the petitioner had subsequently come down from his place of employment abroad and is now available in the matrimonial home, it is submitted and not disputed. I say so because it is the case of the respondent that even though she alone is shown as the respondent, the children are being kept at the matrimonial home with the respondent, the said Sulekha and the husband of the petitioner - all available to look after the children.

5. It is not disputed that the petitioner has now been divorced by her husband and the husband has now remarried. Nothing was heard of the petitioner till 3/4/2006. She returned to her native place on that day. She appeared before the police. The police recorded her statement. Along with the statement and a report she was taken before the Magistrate. The Magistrate ascertained details from the petitioner. She was set at liberty as she asserted that she was not under confinement by any one.

6. Long after she was left free by the learned Magistrate on 3/4/06, the petitioner came to court with the present application under Sec.97/98 of the Cr.P.C. on 27/7/06. The

short contention raised by her is that both her children are now under confinement at her matrimonial home and the confinement amounts to an offence. She further alleged that retention of her minor children over whom she has rights of custody in the house of the respondent against her wishes amounts to unlawful detention for an unlawful purpose and therefore if not under Sec.97 action is liable to be taken by the learned Magistrate under Sec.98 of the Cr.P.C.

7. The claim was resisted by the respondent. She contended that there was absolutely no confinement. At any rate, there was by no stretch of imagination, any confinement which would amount to an offence. She further contended that continued residence of the minors at the house of their father cannot and does not amount to unlawful detention. At any rate, there is no unlawful purpose involved at all. Of course, it was further urged that the petitioner is not worthy of the custody of the children because of her own undisputed conduct of deserting the minor children, abandoning them and proceeding along with the friend of her husband with whom she had developed an illicit affair. It was pointed out that she wanted to

get married to that person and had made no secret of it in the statement given by her to the police before she was produced before the learned Magistrate.

8. The learned Magistrate by the impugned order took the view that no action is liable to be taken in the matter. A dispute regarding custody of the minor need not be taken cognizance of by the criminal court under Secs.97 and 98 of the Cr.P.C., it appears to have been held, though the learned Magistrate did not, of course, proceed to consider the prayer under Sec.98 in detail.

9. The first question is whether action under Sec.97 of the Cr.P.C. is liable to be taken. I extract Sec.97 below:

> "**97. Search for persons wrongfully confined.--** If any District Magistrate, Sub-Divisional Magistrate or Magistrate of the first class has reason to believe that any person is confined under such circumstances that the confinement amounts to an offence, he may issue a search-warrant, and the person to whom such warrant is directed may search for the person so confined; and such search shall

> be made in accordance therewith, and the person, if found, shall be immediately taken before a Magistrate, who shall make such order as in the circumstances of the case seems proper."
>
> (emphasis supplied)

A careful reading of Sec.97 must lead to the conclusion that powers under Sec.97 can be invoked only when the court has reason to believe that any person is confined and that confinement is under such circumstances that the confinement amounts to an offence. The plain language must convey eloquently that every confinement does not give a cause of action for an action under Sec.97. The confinement must be under such circumstances that the confinement amounts to an offence before powers under Sec.97 can be invoked. It will be apposite in this context to note that Secs.97 and 98 appear in Chapter VII of the Cr.P.C. which deals with processes to compel the production of things (of course, including persons). Secs.97 and 98 come in Chapter VII-B dealing with search warrants. Secs.97 and 98 are instances were search warrants can be issued for the production of persons under the circumstances

enumerated and stipulated in those sections.

10. What offence is committed by the respondent in keeping the children at the house of the father? This is the first question to be considered. The elder child was admittedly left there by the petitioner when she went away to Nasik. If her alleged statement recorded by the police before she was produced before the learned Magistrate is to be accepted, she asserts that she has confidence that her brother-in-law and his wife Sulekha – they are a childless couple, will look after the children properly and she had left the child in that trust at her husband's place. There is dispute as to whether that statement was given voluntarily or not. Be that as it may, at the moment, and with the available materials that assertion can certainly be accepted. The second child, going by the statement of the father of the petitioner in the First Information Statement lodged by him, was abandoned at the house of the petitioner's father when the petitioner left for Nasik and without any demur and without any objection from any one, the child was taken to the house of the father by father's relatives.

11. Under these circumstances, by no stretch of

imagination, can it be held that the children are confined or that they are confined under such circumstances that the confinement amounts to an offence.

12. My attention has been drawn to three decisions of the Kerala High Court on this aspect. In **Pareekutty v. Ayissakutty** (1978 KLT 33) Justice P. Janaki Amma had taken the view that forcible removal of a minor child from the custody of the mother of the child in whose favour an order of maintenance was passed by the court would be revolting to all refined notions of justice and fair play and that the Magistrate was justified in concluding that the confinement amounts to an offence for the purpose of issuing the search warrant. I extract the following passage appearing in para-12 of that decision:

> "It is revolting to modern sense of justice and fair-play that a person who has lawful custody of the minor should be deprived of such custody by crude means which has no sanction under law. Removal of the child using physical force from the custody of the mother is prima facie a

> wrongful act. Keeping the child beyond the reach of the person who is entitled to its custody would amount to wrongful confinement. The Chief Judicial Magistrate had, therefore, reason to believe that the confinement amounted to an offence for the purpose of issuing a search warrant."

13. It would be myopic from the said decision to conclude that it is not necessary to prove that confinement amounts to an offence on the peculiar facts of this case. The learned Judge had taken the view that the Magistrate was correct in coming to the conclusion that the confinement amounted to an offence. **Pareekutty** (supra) is therefore not at all an authority for the proposition that it need not be alleged and shown that the confinement amounts to an offence to attract or warrant action under Sec.97 of the Cr.P.C.

14. Later, in **Fathima v. Kunhammed Haji** (1993 (2) KLT 943) the question came up for consideration pointedly and another single Judge of this Court had taken the view that the Magistrate must have reasons to believe the existence of, at

least, two things: First is that there is a confinement and second is that such confinement amounts to an offence. It was opined that the Magistrates have to be doubly circumspect in dealing with a petition which contains the allegation that the child is in wrongful confinement of its guardian. The decision in **Fathima v. Kunhammed Haji** (supra) also reiterates the plain language of the Section that there must be a confinement and such confinement must amount to an offence.

15. Still later, in **Abdul Azeez v. State of Kerala** (2002 (3) KLT S.N. Case No.23 at page 16) Justice G.Sasidharan had clearly observed that the mere fact that the grandparents of the child are having the custody of the child does not lead to the inference that the child was taken away forcibly or that such custody amounts to an offence to warrant action under Sec.97.

16. The facts and circumstances of the case are so totally different from the facts in **Pareekutty** (supra) and therefore I am certainly of opinion that it is not possible, in the facts and circumstances of this case, to come to a conclusion that there was a confinement and such confinement amounts to any offence punishable under any law for the time being in force.

17. Complicated questions about the custody of the child are not to be decided in summary proceedings under the Cr.P.C. by a Magistrate. After the constitution of the Family Courts, such questions are to be decided by the Family Courts following a humane and sensitive procedure prescribed under that Act. It need not be repeated, and many precedents of courts have cited before me on this aspect, that such decision has to be taken by a court informed of all the relevant inputs alertly reminding itself that the paramount consideration is the interests of the welfare of the child. I am certainly not persuaded to agree that the said procedure should be short-circuited and any direction under Sec.97 should be issued in the facts and circumstances of this case.

18. Undaunted, the learned counsel for the petitioner Mr.Vinod Madhavan submits that if not under Sec.97, certainly action is bound to be taken under Sec.98. The matter requires detailed consideration as I find that there is no binding precedents on this specific aspect by this Court.

19. Sec.98 of the Cr.P.C. reads as follows:

> **"98. Power to compel restoration of abducted female.--** Upon complaint made on oath of the abduction or unlawful detention of a woman, or a female child under the age of eighteen years, for any unlawful purpose, a District Magistrate, Sub-Divisional Magistrate or Magistrate of the first class may make an order for the immediate restoration of such woman to her liberty, or of such female child to her husband, parent, guardian or other person having the lawful charge of such child, and may compel compliance with such order, using such force as may be necessary."
>
> (emphasis supplied)

20. On simple analysis of the Section it would appear that action under Sec.98 is warranted only if the following conditions are satisfied:

(1) There must be a complaint made on oath before the Magistrate.

(2) Such complaint must be of the unlawful abduction or detention of a woman including a female child under the age of 18 years.

(3) Such unlawful detention must be for any unlawful purpose.

Unless these three requirements are satisfied, powers under Sec.98 cannot be invoked and are not available to the Magistrate to be invoked. Even when such powers are invoked, later part of the Section shows that such persons under unlawful detention for unlawful purpose must be restored to her husband, parent, guardian or significantly other person having the lawful charge of such child. Custody of a person having lawful charge of the child cannot be disturbed, it is evident from the language of Sec.98

21. I must straightaway note that Sec.98 of the Cr.P.C. is a special procedure available. It is not available for all persons. It is available only for the rescue and restoration of persons belonging to the female species. Such person must be shown to

be abducted or unlawfully detained. Such detention must be proved to be for unlawful purpose. What is crucial is that, this provision it is not available for all children or all persons unlawfully detained for unlawful purposes. It has unmistakably a very special purpose to serve and that is the protection of the person belonging to the female species against unlawful detention for unlawful purpose.

21. This must be necessarily lead us to the next question as to what type of detention can be held to be unlawful and as to what purpose can be held to be unlawful purpose. The learned counsel for the petitioner contends that though the expression “unlawful” is not defined in the Cr.P.C. or the IPC there is a definition of the expression “illegal” in Sec.43 of the IPC. The learned counsel contends that the expression “illegal” and “unlawful” must be understood, assumed and reckoned as conveying some idea/concept and therefore the definition of the expression “illegal” in Sec.43 of the IPC must be applied to understand the sweep and width of the expression “unlawful” in Sec.98. Sec.43 of the IPC is extracted below:

> "**43. "Illegal".--** The word "illegal" is applicable to everything which is an offence or which is prohibited by law, or which furnishes ground for a civil action; . . . . . ."
>
> (emphasis supplied)

22. The learned counsel for the petitioner contends that continued retention of the minor children in the house of their father may not technically amount to an offence. It may not be prohibited by law. But still it would continue to be illegal inasmuch as such retention/detention against the will of the mother who is the natural guardian entitled to the custody of the child would furnish a ground for civil action for her. It is therefore contended that the expression "unlawful" must have the same meaning as "illegal" in Sec.43 of the IPC and consequently any act which furnishes a ground for a civil action must be held to be illegal and consequently unlawful and must, in turn, attract and warrant action under Sec.98 of the Cr.P.C.

23. The expression "illegal" and "unlawful" are

synonymous and convey the same idea in language - ordinary and legal. But when a statute employs an expression with intention of conveying a special meaning and with the said purpose defines the expression in such statute as the expression "illegal" is defined in Sec.43 of the IPC, such meaning is to be ascertained for that expression specially and specifically for such a statute and for the purpose of such statute. Merely because two expressions mean the same ordinarily in language and law, both cannot be held to have the same meaning when one of them is specially and specifically defined and explained in one statute. So reckoned, I am unable to accept the argument that the definition of the expression "illegal" in Sec.43 of the IPC must straightaway be mechanically imported into Sec.98 of the Cr.P.C. when we consider the ambit and play of the expression "unlawful" in Sec.98 of the Cr.P.C.

24. Adopting such a course may lead to dangerous and disastrous consequences. If an act can furnish a ground for a civil action, it can be contended to be unlawful and then action by a criminal court under Sec.98 of the Cr.P.C. can be insisted. This would obliterate the distinction between the civil and

criminal proceedings. The queue before the Family Court for resolution of disputes regarding custody of children may be shifted to the criminal courts clamoring for action under Sec.98 of the Cr.P.C. That obviously does not appear to be the purpose, purport, object and motivation of Sec.98 of the Cr.P.C.

25. The very same question appears to have been considered in a **Punjaji Bagul v. Emperor** (AIR 1935 Bombay 164). There the question was one of interpretation of Sec.425 of the IPC. A contention was raised that the expression "wrongful loss" appearing in Sec.425 of the IPC must be understood as defined in Sec.23 of the IPC where the expression "unlawful" is made use of. I extract Secs.425 and 23 of the IPC below:

> "425. **Mischief.--** Whoever with intent to cause, or knowing that he is likely to cause, wrongful loss or damage to the public or to any person, causes the destruction of any property, or any such change in any property or in the situation thereof as destroys or diminishes its value or utility, or affects it injuriously, commits "mischief".
>
> Explanation-1. It is not essential to

> the offence of mischief that the offender should intend to cause loss or damage to the owner of the property injured or destroyed. It is sufficient if he intends to cause, or knows that he is likely to cause, wrongful loss or damage to any person by injuring any property, whether it belongs to that person or not.
>
> Explanation-2.-- Mischief may be committed by an act affec6ting property belonging to the person who commits the act, or to that person and others jointly."
>
> "23. **"Wrongful loss".--** "Wrongful loss" is the loss by unlawful means of property to which the person losing it is legally entitled."
>
> (emphasis supplied)

A contention was raised that the expression "unlawful" appearing in Sec.23 of the IPC must be understood as equivalent to the expression "illegal" as explained in Sec.43 of the IPC. The Division Bench of the Bombay High Court took the view that this cannot be. The relevant observations read thus:

"Mr.Abhyankar for the complainant has relied on the definition of the word `illegal' in Sec.43 of the Code. That definition includes anything which is an offence or which is prohibited by law, or which furnishes ground for a civil action, and it is argued that the word "unlawful" in the definition of `wrongful loss' must have the same meaning as the word `illegal'. Generally speaking, I should say that there is no difference in meaning between the word `unlawful' and the word `illegal', but it does not follow that if one of those words is specially defined in a statute, and the other is not the two words must necessarily have the meaning given to the one word by the definition. Prima facie I should have thought that the word `unlawful' or the word `illegal' used in a Penal Code would not cover anything which gives rise to a civil suit. The word `illegal' has been defined as covering everything which gives rise to a civil suit, but I am not prepared to say that in the Penal Code the word `unlawful', which has

> not been so defined, must be taken throughout as having that very wide meaning."
>
> (emphasis supplied)

These observations of the Bombay High Court support the view which I prefer to take that the expression "unlawful" cannot be reckoned as equivalent to or synonymous with the expression "illegal" appearing in Sec.43 of the IPC as to conclude that any act which would furnish a ground for a civil action can ipso facto justify or compel the court to invoke the powers under Sec.98 of the Cr.P.C. In this view of the matter, I conclude that the mere fact that the alleged custody of the minor children with the respondent may furnish ground for civil action cannot ipso facto render such keeping custody unlawful. It must hence be held that there is no unlawful detention in the instant case.

26. The learned counsel for the petitioner Mr.Vinod Madhavan argues that the position has been accepted by the Madras, Nagpur, Allahabad and Madya Bharat High Courts that Sec.98 of the Cr.P.C. (and its predecessor Sec.552 of the old

Code) has to be understood as necessitating action wherever the conduct furnishes a ground for civil action. With respect, I am unable to accept the said reasoning and I prefer to take the view which the Division Bench of the Bombay High Court has taken in **Punjaji Bagul v. Emperor** (supra).

27. Mr.Thomas M. Jacob, the learned counsel for the 1st respondent, points out that the decision of the Nagpur High Court in **Tulsidas v. Chetandas** (AIR 1933 Nagpur 374) which decision appears to have weighed with all other courts which took the identical view has not been accepted and has been distinguished by the Nagpur High Court itself in **State v. Billi** (1953 Cri.L.J. 743). There, following **Abraham v. Mahtabo** (16 Calcutta 487), it was clearly held that the powers under Sec.98 of the Cr.P.C. (old Sec.552 of the Code) are not available unless there be unlawful detention for unlawful purpose also. **State v. Billi** (1953 Cri.L.J. 743) specifically refers to **Tulsidas v. Chetandas** (AIR1933 Nagpur 374) and distinguishes the same.

28. That takes us to the next question as whether the custody which of the minors by the respondent which is alleged to be unlawful detention can be said to be for any unlawful

purpose. It is not now disputed that the detention must be shown to be unlawful and it must further be shown that the detention was for unlawful purpose also. To my mind the reasons in **Abraham v. Mahtabo** (16 Calcutta 487) appear to be most impressive and acceptable. Whether the purpose is lawful or unlawful is certainly to be decided not with reference to the consequences which any other person may suffer because of the conduct. The lawfulness or otherwise of the purpose of detention will have to be considered vis-à-vis the deteune and not vis-a-vis the parent of the detenue whose rights may be affected or trammeled by the alleged conduct. The observations of the Calcutta High Court in **Abraham v. Mahtabo** (16 Calcutta 487) at pages 501 to 503 which have been extracted in **State v. Billi** (1953 Cri.L.J. 743) by the Nagpur High Court appear to have lucidly considered this aspect. I extract the same below:

> "Undoubtedly there was an unlawful detention. It was immaterial whether the girl did or did not consent; she was kept against the will of those who were lawfully entitled to have charge of her, and this

keeping and the refusal to give her up amounted to detention which was unlawful.

The question whether the purpose was unlawful is, however, more difficult to determine. Admittedly the only purpose was that the girl should become a Christian, and the Magistrate, finding that this involved destruction of her caste and severance from her proper home, held that detention for such a purpose against the will of her guardian was a detention for an unlawful purpose. It is not easy to say what is the meaning of the words "unlawful detention for an unlawful purpose" as used in this section, but their effect clearly is to limit the Magistrate's power of interference to particular cases. It might seem at first sight that the detention of a child, against the will of her parent or guardian with a view that she should be brought up in a religion which such parent or guardian disapproved of, and the adoption of which would not only involve a total change in the child's mode of life, but would also deprive the parent or

guardian of any control in the education or bringing up of the child, would come within the meaning of the words as well as within the mischief which they were intended to provide against.

But we think it is not so; and that the purpose, whether entertained towards a woman or towards a female child, must be in itself unlawful.

The purpose of forcing a woman to sexual intercourse would certainly be unlawful; the purpose of having sexual intercourse with a girl under 14 even with her consent would I take it be equally unlawful within the meaning of this section, because the girl's consent would be immaterial. But it cannot be said that the purpose of enabling or persuading an adult woman to become a Christian would be in itself unlawful. If it is not unlawful in the case of an adult woman, it could only be unlawful in the case of a child by reason of its being done without the guardian's consent. But we think it is impossible to construe the section so as to make it include purpose which, although

not unlawful in themselves, might only become so when entertained towards a child in opposition to the wishes of its guardian.

The section was not enacted for the protection of (sic female?) children only or of children generally. It applies to women & to female children only, and this combination and exclusion of male children, goes to show not only that some definite purpose unlawful in itself, was contemplated, but that the purpose had some special reference to the sex of the person against whom it was entertained. This view is supported by the earlier legislation on the subject. The sections of the earlier Acts corresponding to in S.551 of the Procedure Code (Act 10 of 1882), empowered the Magistrate to act when a woman or female child was obtained for specified purposes; v8iz., adultery, concubinage, prostitution, deflowering or disposing of her in marriage. The words `any unlawful purpose' were first substituted in Bengal Act 4 of 1866 for the specified purposes mentioned in the

> previous Acts, and those words have been used in all the subsequent Acts, but the Magistrate's power has always been restricted to the case of women and female children. It may be that the effect of the alteration was to extend the scope of the section and to include some purposes other than those which were before distinctly specified, but it is unnecessary to consider whether this is the case; it is enough to say that the purpose which is here found to have been entertained is not an unlawful purpose within the meaning of the section."

In **Secretary, S.P.C. v. Archana Das** (43 C.W.N. 362) also it has been held that the mere fact that detention of the child/woman may be against the wishes of the mother cannot be said to be an unlawful purpose within the meaning of Section.

29. In the decision reported in **Umbai v. Limbaji** (AIR 1955 Hydrabad 153) also it has clearly been held that the civil right which a guardian may have in respect of the child cannot entitle him to an order under Sec.552 of the Code (present

Sec.98) for proceedings of civil nature cannot be converted into those of criminal by invoking the powers under Sec.98 of the Cr.P.C.

30. For the detention to be held to be unlawful satisfactory reasons must be shown. A stronger retaining custody of a minor child against the wishes of the guardian cannot be equated to the grandmother who keeps custody of her grandchild after the mother left the child to its own fate and went away with a stranger. The mere fact that the mother claims return of the child and the grandmother does not comply with that request cannot alter the status of permissive protection benovalent custody into one of unlawful detention. There is not even allegation of any unlawful purpose prompting the respondent grandmother to retain custody viewed from the angle/view point of the children. Even the allegation is only that such continued custody of the grandmother (miscalled illegal detention) is unlawful because it offends the right of the petitioner as natural guardian to have the custody of her minor female children both below the age of puberty. I agree that the mere fact that the petitioner as the natural guardian may have a ground for civil

action to get back the custody of the children will not render the continued custody by the grandmother unlawful detention for any unlawful purpose.

31. 'Any unlawful purpose' I agree with the rationale in **Mahtabo,** must be unlawful purpose peculiar to the group of persons for whose safety and protection the section is enacted – i.e., women and female children. A mere grievance of the mother about the deprecation or infringement of her right to custody of her female children as against her husband or mother-in-law cannot certainly give rise to a cause of action under Sec.98. There is neither unlawful detention nor unlawful purpose as to warrant action under Sec.98 of the Cr.P.C.

32. It therefore appears to me to be beyond controversy that the mere fact that the right of the parent, guardian, husband etc., of the woman or female child may be affected by continued retention/custody of such minor/woman is not sufficient to justify invocation of the powers under Sec.98 of the Cr.P.C. There must be an unlawful detention. Such unlawful detention must be for an unlawful purpose and the lawfulness and the unlawfulness of the purpose must be gauged and assessed from the point of view

of the child/detenue and not on the basis of the possible impact on the right of the parent, guardian etc., of such detenue.

33. Coming back to the facts of the case, it is absolutely certain and evident that the children were allowed to be in the company of the grandmother and others at the father's house without any objection or demur. At least from 21/3/06 to 27/7/06 their continuance there was not objected to or complained of. There was no allegation till that day of any unlawful detention for any unlawful purpose. The subsequent change in the attitude of the mother – the petitioner herein, cannot certainly alter such custody/retention of the children into an unlawful one all on a sudden. There is no contention even that the 1st respondent herein or the father of the minor children or the childless sister-in-law of the father had any unlawful purpose motivating them to insist on the continuance of the minors at the father's house.

34. Mr.Vinod Madhavan contends that the children have been deprived of maternal affection and this must suggest to the court that their retention is for an unlawful purpose – deprivation of the maternal care which they would otherwise be

entitled. This contention cannot obviously stand because the children whose mother had gone away leaving them to their fate at the father's house and the mother's house when she left without leaving any word only being protected and looked after by the respondent all along. It cannot, in these circumstances, be held that merely because of the change of the attitude of the mother on and after her return on 3/4/06 the retention of the children in custody of the respondent would become unlawful or the purpose of that retention would be unlawful thereafter.

35. In these circumstances, I come to the conclusion that the learned Magistrate committed no error in not invoking the powers under Sec.97 or 98 of the Cr.P.C. in favour of the petitioner as requested by her. The impugned order does not warrant interference and this revision petition cannot succeed.

36. Before parting with this case, I may hasten to observe that it is not my intention at all to express any opinion on the right of the mother to claim custody of the children or to claim visitation rights in so far as the children are concerned. I note that the children are of tender years. I further note that the petitioner under Mohammedan Law is undisputedly the natural

guardian/mother who is entitled to custody of both children till the children attain puberty. The petitioner must resort to the normal and the acceptable procedure of approaching the court (Family Court) under the Guardian and Wards Act and such court must consider the petitioner's prayer. Even hard cases cannot persuade a court to ignore the legal principles and it is, in these circumstances that I am persuaded to hold that the petitioner cannot seek relief from the criminal court by invoking its powers under Sec.97/98 of the Cr.P.C. The petitioner will undoubtedly be at liberty to approach the Family Court and seek appropriate orders including emergent interim orders. I need not specifically mention, and the Family Court should do that, that the petitioner shall be at liberty to seek appropriate expeditious orders from the Family Court.

37. With the above observations, this revision petition is dismissed.

(R. BASANT, JUDGE)

Nan/